

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LAURA HAWKINS</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>ARMOUR ECKRICH MEATS</b>	)	
Respondent	)	Docket No. 1,040,531
	)	
AND	)	
	)	
<b>ACE AMERICAN INSURANCE CO. and</b>	)	
<b>INDEMNITY INS. CO. OF NORTH</b>	)	
<b>AMERICA</b>	)	
Insurance Carrier	)	

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier, Ace American Insurance Company, (respondent) requested review of the July 15, 2009, preliminary hearing Order and the July 27, 2009, Nunc Pro Tunc Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant is entitled to medical care and ordered respondent to provide claimant with the names of three qualified physicians from which claimant may designate an authorized treating physician. The ALJ also found that claimant was temporarily totally disabled and ordered respondent to pay temporary total disability benefits from June 10, 2009, until claimant is released to return to work, offered accommodated work within her temporary work restrictions, has attained maximum medical improvement, or until further order of the ALJ.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 1, 2009, Preliminary Hearing and the exhibits, together with the

pleadings contained in the administrative file, including the independent medical examination reports of Dr. Brian Divelbiss and Dr. James Eyman.<sup>1</sup>

### **ISSUES**

Respondent requests the Board to reverse the ALJ's July 15, 2009, preliminary hearing order requiring it to provide claimant with medical treatment for her physical injuries. Respondent acknowledges that claimant suffered bilateral carpal tunnel syndrome as a result of her work activities, and acknowledges its responsibility to treat those injuries. However, it claims that claimant has a non-work related condition causing a contracture in her left hand which is not work related but is, in fact, caused by her psychological problems. Respondent contends that claimant's bilateral carpal tunnel syndrome cannot be treated until after her psychological problems are addressed, and it denies that those psychological problems were connected to her work activities. Therefore, respondent argues that it should not be required to pay for medical treatment or temporary total disability compensation for claimant until such time as claimant's psychological problems have been addressed.

Claimant requests that the Board affirm the ALJ's Preliminary Hearing Order and Nunc Pro Tunc Preliminary Hearing Order, arguing that she did not have any problems with her bilateral upper extremities before she started working for respondent, nor did she have any psychological problems or clenched fist problem.

The issue for the Board's review is: Did claimant sustain an accidental injury that arose out of and in the course of her employment at respondent?

### **FINDINGS OF FACT**

Claimant testified that her job at respondent required her to repetitively use her hands. On or about April 11, 2008, she reported to her supervisor that she was having problems with her hands. She was initially seen at Occupational Health Services, where Dennis Sewell, PA, found she had symptoms of bilateral carpal tunnel syndrome. He restricted her use of the left hand and provided her with a splint for the left wrist. Nerve conduction studies were performed, and on May 28, 2008, she was diagnosed by Dr. Gary Harbin with bilateral carpal tunnel syndrome with swelling in the hands. Dr. Harbin recommended carpal tunnel release surgery on both her left and right hands.

Claimant was then referred by respondent to Dr. Anne Rosenthal for another opinion. Dr. Rosenthal confirmed claimant's diagnosis of bilateral carpal tunnel syndrome, which she related to her hand-intensive job at respondent. However, Dr. Rosenthal also

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<sup>1</sup> A discovery deposition of the claimant, Laura Hawkins, taken November 11, 2008, was not considered in this appeal because there is no agreement in the record that it could be used.

noted that claimant had significant swelling in her left hand, which she attributed to Secretan's disease, a self-inflicted edema. Dr. Rosenthal recommended claimant have a psychiatric evaluation and also stated that she would not consider performing surgery on claimant's bilateral hands because of her Secretan's disease. Dr. Rosenthal treated claimant from June 24, 2008, through August 20, 2008.

Claimant was seen on September 23, 2008, by Dr. Joseph Huston at the request of claimant's attorney. He diagnosed claimant with bilateral carpal tunnel syndrome, which he related to the repetitive use of her hands at work. He could not fully explain the flexed position of the fingers in her left hand but said it might be relieved by carpal tunnel release surgery.

Dr. Bruce Toby examined claimant on December 5, 2008, at the request of respondent. He also diagnosed claimant with bilateral carpal tunnel syndrome, although he did not believe she needed carpal tunnel release surgery. He did not believe that carpal tunnel syndrome explained the other symptoms she presented with and did not believe her work activity would have caused her flexed fingers of her left hand.

Dr. Brian Divelbiss examined claimant on June 11, 2009, at the request of the ALJ to give an opinion as to whether claimant's current physical complaints were related to her work activities at respondent, as well as to offer opinions as to diagnosis, recommendations for treatment, claimant's ability to work, and appropriate work restrictions. After his examination of claimant, Dr. Divelbiss opined that claimant has clenched fist syndrome, a conversion disorder with underlying psychiatric causes. He said the clenched fist syndrome is not a physical injury related to her work activities or carpal tunnel syndrome, and treatment for the clenched fist syndrome should be directed by a psychiatrist.

Dr. Divelbiss confirmed that claimant had bilateral carpal tunnel syndrome, which he found was related to her repetitive work activities. But because of her psychiatric issues, he said it was unclear if she would have much improvement in her right hand with carpal tunnel release. He further did not think that a left carpal tunnel release would likely provide claimant any functional improvement in her left hand and thought surgery on that hand was contraindicated. Dr. Divelbiss recommended that claimant have work restrictions of no pinching, grasping or gripping with the left hand and no repetitive activities with the right hand.

#### **PRINCIPLES OF LAW**

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>2</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>3</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>4</sup>

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,<sup>5</sup> the court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

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<sup>2</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>3</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>4</sup> *Id.* at 278.

<sup>5</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>7</sup>

### ANALYSIS

Respondent does not dispute its liability for providing claimant with treatment for her bilateral carpal tunnel syndrome conditions but contends the ALJ erred in ordering it to also provide claimant with medical treatment for her clenched fist condition. Respondent argues that the clenched fist condition is not a work-related physical injury but, instead, is an unrelated psychological condition. The ALJ had previously ruled, however, in an order dated June 10, 2009, that claimant's psychological condition is a direct and natural consequence of her physical work-related injuries, specifically the carpal tunnel syndrome conditions. That ruling was appealed by respondent to the Board, and the ALJ's order was affirmed by this Board Member on September 17, 2009. The only new evidence presented in this record that was not part of the record in the previous appeal is the court-ordered IME report of Dr. Divelbiss. His opinions do not materially change the situation. Dr. Divelbiss relates claimant's clenched fist syndrome or contracture condition to a psychiatric condition as opposed to a physical injury. Dr. Divelbiss is not a psychiatrist. He does not give an opinion on whether the psychiatric condition is work-related, nor was he asked to give such an opinion by the ALJ. Dr. Divelbiss does recommend that claimant's clenched fist condition be treated by a psychiatrist. As such, it is reasonable to conclude that Judge Sanders' July 15, 2009, Order for medical treatment is not intended to include the clenched fist condition. Rather, her Preliminary Hearing Order of June 10, 2009, which directed respondent to provide a "physician or physicians . . . to provide individual psychotherapy . . . and provide behavioral pain management" was the order that addressed the psychological issues, including the clenched fist condition. The July 15, 2009, Order that is the subject of this appeal is directed towards providing medical treatment for claimant's physical injuries.

Given the prior determination that claimant's psychological condition is directly traceable to her work-related injuries and that there is no new evidence contradicting that determination, the ALJ's order is affirmed.

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<sup>6</sup> K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>7</sup> K.S.A. 2008 Supp. 44-555c(k).

**CONCLUSION**

Claimant's injury arose out of and in the course of her employment with respondent.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the July 15, 2009, Order and the July 27, 2009, Nunc Pro Tunc Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders are affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September, 2009.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge